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June 12, 2002

Corbin R. Davis, Esq.
Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

Re: Proposed amendment to MRE 703

Dear Mr. Davis:

I write to comment on amendments proposed to MRE 703 with respect to "Bases of Opinion Testimony by Experts." The alternative proposals to amend MRE 703 which were published for comment in the May 2002 Bar Journal, and the Staff Comment which accompanies the proposals, in my view, reflect a fundamental misunderstanding of Rule 703 as it was adopted in 1978 and as it has been applied over the years.

I write, among other things: 1) as the former Chair of the Michigan Supreme Court Committee (1975-78) that drafted the proposed Michigan Rules of Evidence; 2) as someone who has, on more than one occasion over the years, expressed concern, in evidence lectures and in print, about the changes made in 1978 by the Supreme Court to its Evidence Committee's proposed MRE 703 which was patterned after FRE 703; 3) as someone who has more than once proposed amending MRE 703 to conform it with FRE 703; 4) as a lawyer who has used MRE 703 many times in Michigan courts over the years and taught numerous Michigan trial judges about it for the Michigan Judicial Institute; 5) as a co-author of the three-volume work entitled Michigan Court Rules Practice—Evidence and its accompanying work entitled Courtroom Handbook on Michigan Evidence, both published by West, and 6) as an evidence teacher for many years in Michigan who taught both FRE 703 and MRE 703 to law students, lawyers and judges. In short, I believe I know what I'm talking about here, and I care deeply about the MRE.

To be blunt, I feel strongly that the proposed amendments to MRE 703 would be a serious mistake for Michigan. To the best of my knowledge, if Michigan were to revert to the pre-Rule 703 approach of requiring that expert opinions must be based entirely on facts or data

independently admissible in evidence, it would be the only jurisdiction in the United States to adopt such an approach.

The Staff Comment to the proposed amendments states that: "Both alternatives for MRE 703 would correct a common misreading of the current rule. As adopted in 1978, MRE 703 said, 'The court may require that the underlying facts or data essential to an opinion be in evidence.' That language was designed to give courts the discretion to exclude opinions that are not based on admissible evidence. However, the rule came to be understood as allowing an expert to testify about inadmissible hearsay that was part of the basis for the expert's opinion." If, in fact, MRE 703 has been "misread" in this respect, I certainly must accept much of the blame since I have been "misreading" the rule since it was adopted in 1978 and encouraging hundreds of law students, lawyers and judges to do the same. My belief, instead, is that the Staff Comment's reading of MRE 703 is wrong both as a matter of history and evidence law.

With respect, the sentence quoted in the Staff Comment was NOT added by the Supreme Court, as the comment states, to allow trial courts the discretion to exclude opinions not based on "admissible evidence." Indeed, nothing in the MRE supports this notion. Instead, the quoted language was intended give courts the discretion to require that "underlying facts or data essential to an opinion" be actually placed in evidence so that it could be examined by the trier of fact in evaluating the bases for the expert's opinion and the evidentiary weight to give the opinion. MRE 703 specifically permits experts to base their opinions on facts or data "perceived by or made known to the expert at or before the hearing." The truth is that otherwise inadmissible hearsay can, and frequently does, serve as a basis for an expert's opinion under MRE 703, just as it can under FRE 703. When otherwise inadmissible hearsay is offered not for its truth, but as part of the information on which the expert reasonably bases his or her opinion, it is relevant, non-hearsay evidence which sheds light on the weight and value of expert's admissible opinion. As such, it is admissible under the MRE, and, upon request, the opponent is entitled to an appropriate limiting instruction.

I have always taken issue with the Supreme Court for deleting the second sentence of proposed MRE 703 (identical to the second sentence of FRE 703) which provides: "If of a type reasonably relied upon by experts in the particular field in forming opinions on the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." See Robinson, Improving Michigan Evidence Law, 70 Mich. B.J. 136, 139 (1991). MRE 703 expressly permits experts, without limitation, to rely on facts or data made known to them "before the hearing." When those facts or data, which are clearly relevant to the expert's opinion, are offered in evidence not for their "truth," but rather as the permissible basis for the expert's opinion, they are not "inadmissible hearsay." As argued in our Courtroom Handbook of Michigan Evidence: "[T]he grant of discretion to the trial court to require the data to 'be in evidence' was intended to allow the trial court to increase the reliability of the expert's opinion by recognizing that the trial court may require the that 'essential' underlying facts 'be in evidence.' It was clearly not intended to create a new hearsay exception that would permit the substantive use of the underlying data, although the rule as phrased, may lead some to make this argument." Robinson & Longhofer, Courtroom Handbook of Michigan Evidence, Sec.703.2, p.404 (2001).

It was the Michigan Supreme Court's 1978 deletion of the second sentence of proposed MRE 703 which, in my view, created the mischief to which the proposed amendments to MRE 703 are partially directed. The Court did so by failing to limit the permissible data for expert opinions to those of a type "reasonably relied upon by experts in the field in forming opinions or inferences upon the subject." If the Court had limited the facts or data experts could rely upon in forming opinions only to those made known to the expert "at the hearing," or to facts or data which could, independent of serving as the basis for the expert's opinion, be admitted in evidence, it would have simply codified pre-MRE Michigan evidence law. Instead, however, the Court expressly stated in the first sentence of MRE 703 that experts could form opinions based on facts or data made known to them "at or before the hearing" without any limitation. The only qualification was to provide, in the second sentence of MRE, that the trial judge has the discretion to require that "underlying facts or data essential to an opinion be in evidence." What about facts or data properly made known to the expert before the hearing upon which the expert bases his or her opinion? When offered for the non-hearsay purpose of shedding light on the expert's permissible opinion, such evidence is clearly relevant to the weight and value of expert's opinion, and thus it is admissible under MRE 402 and not excludable as hearsay under MRE 802 because such information is not being offered for the truth of the matter asserted and thus, it is not hearsay at all. While an objection under MRE 403 is theoretically a basis for exclusion of such evidence, since the balancing test requires that the probative value of the evidence be substantially outweighed by unfair prejudice, etc, exclusion on this ground is highly problematic.

Both MRE 703 and FRE 703 permit otherwise inadmissible hearsay to be exposed to the jury as the basis for the expert's opinion. Even with a limiting instruction, however, the danger exists that the jury may misuse evidence such as using otherwise inadmissible hearsay for its truth, thereby creating a stealth hearsay exception. I discussed this possibility in a chapter of the Third Edition of the ABA Litigation Section's publication "Emerging Problems Under the Federal Rules of Evidence" at pages 224-233. There I noted: "Without doubt Rule 703 does provide opportunities for abuse by exposing otherwise inadmissible evidence before the fact-finder as the basis for the expert's opinion. It is important for those entrusted with the invocation and application of the evidence rules to guard against wholesale circumvention of the exclusionary aspects of the rules through the back door of Rule 703."

These concerns led to an amendment to FRE 703 in 2000 which added the following sentence to FRE 703: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." The Advisory Committe Note to the 2000 amendment states that: "This amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert."

To the extent that the purpose of the proposed amendments to MRE 703 is to prevent otherwise inadmissible evidence from being lightly exposed to the jury, the FRE 703 amendment accomplishes that goal and its adoption by Michigan would be preferable to the currently proposed amendments to MRE 703. To the extent, however, that the purpose of the proposed

amendments to MRE 703 is to roll back the clock to the pre-MRE 703 days when expert opinions could be excluded entirely because some or all of the bases for the opinions were not in the judicial record of otherwise admissible evidence, it would be a mistake for Michigan. When FRE 703 was adopted in 1975 it was an innovation to allow experts to rely on facts or data presented outside of court. The Advisory Committee Note to FRE 703 pointed out that the purpose of enlarging the permissible data for experts to rely upon in forming their opinions was "to bring the judicial practice into line with the practice of the experts themselves when not in court." The FRE Committee Note correctly pointed out that "life and death decisions" are made every day by experts in reliance on such facts and data, and the expert's "validation" of such information "expertly performed and subject to cross-examination, ought to suffice for judicial purposes."

When the Michigan Supreme Court deleted the second sentence to the proposed MRE 703 in 1978 and inserted the current language, it did so without explaining its reasons for doing so. The language chosen by the court stands alone and finds no parallel in other evidence codifications. MRE 703 has long been in need of reform. The Michigan Supreme Court now has an opportunity squarely to address an important policy question concerning the permissible bases for expert opinion testimony and how to limit the exposure of otherwise inadmissible information to the jury through the back door of MRE 703.

I urge, as I have done consistently over the years, that Michigan follow the lead of the federal courts in this area by adopting the federal version of Rule 703. Doing so will avoid having one standard of expert testimony for Michigan federal courts and another for Michigan state courts. More importantly, the federal rule version of Rule 703 makes for better evidence policy and will bring the added value of providing Michigan judges and lawyers with the benefit of decisions by federal courts around the country applying identical Rule 703 language in a large variety of factual and legal settings thereby assisting the development of Michigan evidence law as well. Adoption of the current version of FRE 703, including its 2000 amendment, will best serve to carry out the noble purposes of the MRE as set forth in MRE 102: "These rules are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

I urge the Court to reject the proposed amendments to MRE 703 and instead amend MRE 703 by adopting the language of the current version of FRE 703.

Sincerely,

James K. Robinson

Cc: John W. Reed, Esq.
Ronald Longhofer, Esq.
Michigan Lawyers Weekly